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7 BEFORE THE OFFICE OF THE INSURANCE COMMISSIONER
8 OF THE STATE OF WASHINGTON

9 In the Matter of the Application regarding the
10 Conversion and Acquisition of Control of
11 Premera Blue Cross and its Affiliates.

No. G 02-45

PRE-FILED TESTIMONY OF SCOTT
BENBOW

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13 1. My name is Scott Benbow. I received my law degree from Columbia University in New
14 York City and my B.A. from the University of Maine. I am a Staff Attorney at the West
15 Coast Regional Office of Consumers Union, nonprofit publisher of *Consumer Reports*
16 magazine. Since I joined the office in May 2000, I have worked on the Community
17 Health Assets Project, a bicoastal partnership between Community Catalyst in Boston
18 and Consumers Union in San Francisco. As part of the Project, I work with community
19 groups and state officials across the country to ensure health assets are preserved for the
20 public when nonprofit health care institutions convert to for-profit corporations. I am
21 testifying on behalf of Consumers Union.
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- 1 2. Consumers Union, publisher of *Consumer Reports* magazine, is an independent,
2 nonprofit testing and information organization serving only consumers. We are a
3 comprehensive source for advice about products and services, personal finance, health
4 and nutrition, and other consumer concerns. Since 1936, our mission has been to test
5 products, inform the public, and protect consumers. Our income is derived solely from
6 the sale of *Consumer Reports* and our other services, and from noncommercial
7 contributions, grants, and fees. With regard to conversion work, the Community Health
8 Assets Project has provided technical assistance, legal and public policy analysis to
9 community groups, insurance commissioners, attorneys general, courts, and legislatures
10 in more than 40 states. These efforts included consumer involvement during the review of
11 proposed conversions and efforts to establish new health foundations with health care
12 conversion charitable assets.
- 13 3. The Ford Foundation and the Kellogg Foundation support the Project's efforts to monitor
14 conversion transactions and resulting foundations.
- 15 4. The Project has published two documents that I believe would be helpful to the
16 Commissioner's office as it evaluates the foundation-related aspects of Premera's
17 proposal. Both documents are available in electronic format on our web site: *Building*
18 *Strong Foundations* (see Exhibit A, attached and available at
19 www.consumersunion.org/conv/pub/publicationsstates/000636.html)
20 and *Conversion and Preservation of Charitable Assets of Blue Cross and Blue Shield*
21 *Plans: How States Have Protected or Failed to Protect the Public Interest* (see Exhibit B,
22 attached and available at www.consumersunion.org/pub/core_health_care/000928.html).
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- 1 5. Consumers Union offers this testimony to assist the Insurance Commissioner and the
2 Attorney General in their decision about whether the transaction is in the public interest,
3 particularly related to the creation of two proposed conversion foundations. To prepare
4 for this testimony, I have reviewed both the original plan of conversion, dated September
5 17, 2002, and the amended plan, dated February 5, 2004. In both the original and
6 amended applications, I have paid particular attention to the foundation related issues. I
7 will likely review additional information and reports before I testify at the administrative
8 proceeding.
- 9 6. Consumers Union became interested in the sale of Premera because this is precisely the
10 type of work that my organization is funded to examine. In 2000-2001, Consumers
11 Union advised a coalition of consumer groups, including several members of the Premera
12 Watch Coalition, that were examining the proposal by Regence Blue Shield to merge
13 with Illinois-based Health Care Service Corporation.
- 14 7. All across the country, nonprofit health organizations such as hospitals, HMOs, and
15 insurance companies are becoming for-profit businesses or are consolidating in ways that
16 fundamentally alter their corporate form. These transactions are called "conversions." In
17 them, two important community resources are at stake: health services that are critical for
18 maintaining healthy communities and nonprofit assets that have been built by and on
19 behalf of the public. Generally, in the Blue Cross/Blue Shield conversions that
20 Consumers Union has monitored, when a Blue Cross/Blue Shield is converted or sold,
21 the sale proceeds remain in the nonprofit sector. Sale proceeds of a nonprofit must not go
22 to private individuals, to the board of the nonprofit, or to the managers of the nonprofit.
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1 These assets are not, and never were, owned by the nonprofit corporation. If the assets are
2 “owned” by anybody, it’s the people of Washington and Alaska, for whose benefits they
3 have been dedicated in a nonprofit corporation, who own them.

4 8. The majority of health industry conversions have resulted in new foundations. According
5 to Grantmakers in Health, since the mid-1970s, over 165 foundations have been created
6 in 35 states. Together, these foundations have assets totaling over \$16 billion. (See *A*
7 *Profile of New Health Foundations*, Grantmakers in Health, May 2003, page 3, attached
8 as Exhibit C and available at http://www.gih.org/usr_doc/2003_Profile_Report.pdf.)

9 9. Premera’s original and amended plans include highly detailed descriptions of the
10 obligations and authority of the foundations that will be established in Washington and
11 Alaska if Premera is permitted to convert. Premera makes the foundations fundamental to
12 the transaction. While Premera proposes to endow the Washington and Alaska
13 foundations with 100% of the initial capital stock of the new for-profit company called
14 New Premera, it requires that the foundations agree to provisions that would prevent the
15 foundations from exerting control over New Premera. And, if the foundations cannot
16 exercise control, they have no power to protect their stock investments in New Premera.
17 One way to remedy this would be for each of the foundations to maintain seats on the
18 New Premera board of directors.

19 10. While Premera proposes that the foundations maintain no authority over their own post-
20 conversion stock investments in New Premera, the proposal contains provisions under
21 which the new for-profit company would control the grantmaking activities of both
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1 foundations. The proposal seeks to prohibit them from making grants that the company
2 deems to be materially adverse to the operation of health insurers.

3 11. Even more problematic, however, is Premera's effort to maintain a right to sue any
4 foundation grantees that use funds for activities that Premera believes may be materially
5 adverse to the operations of for-profit health insurers. In Section 3 of its Transfer, Grant,
6 and Loan Agreement, Premera proposes that New Premera will be a "third-party
7 beneficiary" of the Washington Foundation. It proposes that, as a "third-party
8 beneficiary," New Premera will be authorized to seek injunctive relief against any
9 foundation grant recipient that is using its grant in a way that New Premera deems
10 materially adverse to the operation of health insurers.

11 12. A health care foundation funded with assets from a nonprofit conversion has a unique
12 public character and therefore a responsibility to ensure participation by the community it
13 serves. Premera's proposal does not take community participation into consideration and
14 instead seeks to maintain a great degree of control over the assets that it has an obligation
15 to set aside. Consumers Union believes that the nonprofit character of the assets at stake
16 is more appropriately left to the disposition of the people of Washington and Alaska, not
17 the converting company. There needs to be a strict separation of the nonprofit assets held
18 by the foundations and the ongoing for-profit enterprise New Premera.

19 13. Unlike foundations created by private wealth or corporate generosity, conversion
20 foundations hold assets already dedicated to the broader public's interest. Generally,
21 when foundations are created by private donors, the donors decide, on their own, how to
22 distribute the funds for charitable purposes. In contrast, conversion foundation assets are
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1 not privately held, but are already dedicated to benefit the public. Thus, the foundation is
2 continuing a public trust. The board of directors of a conversion foundation should
3 determine how to spend the funds entrusted to it through meaningful consultation with
4 the public. Foundations formed from nonprofit assets should represent and reflect the
5 broader community and its health needs.

6 14. Because these assets were built in the community, it should be up to the community to
7 decide how to use them. The process should be public, rather than dictated by the
8 converting company. Regulator and consumer involvement should strongly influence
9 how effectively conversion assets are used and whether the resulting foundation will meet
10 the highest standards for community engagement, accountability, and sound
11 philanthropic practices. Planning of the foundation should have the same level of
12 regulatory and community oversight as the conversion transaction itself does. The
13 process should encourage public dialogue, engage diverse elements of the community,
14 and foster consensus about community health improvement goals.

15 15. If the conversion is approved, Consumers Union recommends that the Washington
16 Insurance Commissioner appoint a diverse Planning Committee with a clearly delineated
17 role to make comprehensive, non-binding recommendations to the regulator about the
18 mission, structure, and governance of the new foundation. Chaired by a highly respected
19 community leader, the Planning Committee should include members representing the
20 demographic and geographic diversity of the population that the Washington foundation
21 will serve. The Planning Committee should also represent a wide cross-section of
22 opinions, backgrounds, and expertise. It is critical that the Committee include people who
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1 understand the concerns of vulnerable and traditionally underrepresented populations.
2 Additionally, individuals with expertise in public health, community development, and
3 philanthropy can provide beneficial input.

4 16. With a fully constituted Planning Committee, Consumers Union recommends that the
5 Insurance Commissioner or Attorney General help Committee members explore all of the
6 options, consistent with the charitable trust and *cy pres* doctrines, for disposition of the
7 converting corporation's charitable assets. Consumers Union recommends that the
8 regulator should:

- 9 • Provide adequate staff support to the planning process, or financial assistance
10 to enable the engagement of qualified planning consultants;
- 11 • Prepare a clear agenda for each meeting that focuses deliberation on
12 foundation purposes, structure, and governance;
- 13 • Encourage open dialogue about the nature, scope, mission, and governance of
14 the new foundation;
- 15 • Lead Planning Committee members in a discussion that links the unique
16 origin of nonprofit conversion assets to the importance of mechanisms for
17 ongoing community involvement and input during the life of the foundation;
- 18 • Invite experts who can provide background that enables the Committee
19 members to evaluate a variety of options;
- 20 • Facilitate the drafting of articles of incorporation and bylaws that reflect the
21 consensus of the Committee on key governance issues; and
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- Establish a process for the Committee's recommendations to be subject to public review with a series of public hearings around the State of Washington.

17. There are at least two possible selection processes that the Washington Insurance Commissioner could use to establish the Planning Committee. In each possibility listed below, the Commissioner has the ultimate authority to appoint members based on a slate of nominees:

- A. Once Planning Committee membership criteria are established there should be a public and open process to search for qualified candidates. Consumers Union recommends that the regulator disseminate the criteria for Committee membership, widely publicize the call for nominations, provide ample opportunity for many people to respond with suggestions, and be prepared with clear answers to any questions regarding how final selections will be determined. At the end of the outreach and nomination process, the Insurance Commissioner should select the Planning Committee members; or
- B. The Insurance Commissioner, in conjunction with staff, would identify twenty to thirty constituencies that reflect the diversity of the state. The Commissioner would then identify groups throughout the community who represent these constituencies to nominate individuals for Planning Committee membership. Each group would be permitted to identify one nominee to represent that constituency. From the list of nominees, the Commissioner would appoint Planning Committee members.

- 1 18. The process for establishing a Planning Committee is an important element for obtaining
2 public accountability and involvement in the new foundation in Washington. Since the
3 foundation will be entrusted with this very important charitable asset, it is imperative that
4 the foundation be established thoughtfully and deliberately. The suggestions for creation
5 of the Committee outlined above, while providing additional processes, would not be
6 unduly burdensome. Given the high degree of community interest in the conversion,
7 there should be a large pool of persons interested in serving on the Planning Committee.
- 8 19. The costs for publicity and outreach, translation, skilled facilitation, recording, engaging
9 philanthropic expertise, and conducting community assessment and planning should be
10 covered by the converting nonprofit organization or from proceeds of the conversion,
11 under the supervision of appropriate regulatory officials.
- 12 20. Depending on the type of transaction, tax status chosen, amount and form of assets to be
13 transferred, and governing state law, the process might take from several months to more
14 than a year. Once established, new health foundations may take from a month to a
15 number of years to make their first grants. On average, according to a recent survey, they
16 took roughly twelve months to do so. (See *Assets for Health*, Grantmakers in Health,
17 March 2002, page 8, attached as Exhibit D and available at
18 http://www.gih.org/usr_doc/2001%20Conversion%20Report.pdf.)
- 19 21. The foundation's mission should be defined by the Planning Committee. Generally, the
20 foundation should be dedicated to promoting or serving the health care needs primarily of
21 underserved and vulnerable populations. Beyond the focus on underserved and
22 vulnerable populations, the foundation should not focus on any one specific group. The
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1 mission should provide sufficient flexibility for the board, in conjunction with the
2 community, to determine the community's health care needs at any given time. A
3 predetermined mission which identifies a discrete population, group or service that the
4 foundation should fund will not provide the foundation with the ability to adapt and be
5 responsive to the changing health care system.

6 I declare under penalty of perjury of the laws of the State of Washington that the
7 foregoing is true and correct.

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9 Dated this 31st day of March 2004, in San Francisco, California.

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12 SCOTT BENBOW
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